COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2184CV00884

ROBINHOOD FINANCIAL, LLC

vs.

WILLIAM F. GALVIN, SECRETARY OF THE COMMONWEALTH, in his official capacity, and the MASSACHUSETTS SECURITIES DIVISION OF THE OFFICE OF THE SECRETARY OF THE COMMONWEALTH

MEMORANDUM OF DECISION AND ORDER
ON CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

This is an action for injunctive and declaratory relief brought by plaintiff Robinhood Financial, LLC ("Robinhood") against William F. Galvin, in his role as the Secretary of the Commonwealth, and his office, including the Enforcement Section of the Securities Division (collectively, "Secretary"). The Secretary has brought an administrative enforcement proceeding against Robinhood (the "Administrative Action") in which the Secretary alleges that Robinhood violated the Massachusetts Uniform Securities Act ("MUSA"), G. L. c. 110A, by, among other things, breaching a fiduciary duty that it allegedly owed to its customers when providing investment recommendations or advice. The fiduciary duty allegation in the Administrative Action is grounded upon a regulation adopted by the Secretary on March 6, 2020, codified at 950 C.M.R. § 12.207 (1) (a) ("the Fiduciary Duty Rule"). Section 12.207 (1) (a) deems it an "unethical or dishonest conduct or practice" for purposes of an enforcement action under G. L. c. 110A, § 204 (a) (2) (G) for a broker-dealer like Robinhood to "fail[] to act in accordance with a fiduciary duty to a customer when providing investment advice or recommending an investment strategy, the opening of or transferring of assets to any type of account, or the purchase, sale, or

exchange of any security." The Secretary claims to have promulgated the Fiduciary Duty Rule pursuant to G. L. c. 110A, § 412 ("the Statute"), which permits the Secretary to "defin[e] any terms," including the term "unethical or dishonest conduct or practice" found in G. L. c. 110A, § 204 (a) (2) (G).[1]

At the time the Fiduciary Duty Rule was adopted, the Secretary amended 950 CMR § 12.204 (1) (a) (4) and added Section 12.204 (1) (a) (29) to implement the new rule. Section 12.204 (1) (a) (4) made it a dishonest or unethical practice, except as provided in 950 CMR § 12.207, to "recommend[] to a customer an investment strategy, the opening of or transferring of assets to any type of account, or the purchase, sale or exchange of any security without reasonable grounds to believe that such transaction or recommendation is suitable for the customer based upon reasonable inquiry concerning the customer's investment objectives, financial situation and needs, and any other relevant information known by the broker-dealer." Section 12.204 (1) (a) (29) added violation of Section 12.207 to the list of dishonest or unethical practices.

Robinhood sued to challenge the validity of the Fiduciary Duty Rule, claiming that it was invalid on its face and as applied to Robinhood.[2] Robinhood contended in its complaint, and argues now, that the Fiduciary Duty Rule unlawfully overrides Massachusetts common law, that the Secretary lacked the authority to adopt the Fiduciary Duty Rule, and that it is preempted by a regulation previously promulgated by the Securities and Exchange Commission ("SEC") that imposed a national "best interest" standard of conduct, rather than a fiduciary standard of conduct, for brokerage firms that provide investment recommendations to customers.

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[1] Section 204 (a) (2) (G) permits the Secretary to impose sanctions against a broker-dealer for "engag[ing] in any unethical or dishonest conduct or practices in the securities, commodities or insurance business."

[2] Robinhood seeks invalidation of only Section 12.207 (1) (a) and the sections of Title 950 that refer to it, and not the entirety of Section 12.207.

Initially, Robinhood sought an injunction against application of the Fiduciary Duty Rule in the Administrative Action, which this Court (Salinger, J.) denied. See Docket No. 19. However, the Court (Salinger, J.) subsequently permitted the parties to file partially dispositive, cross-motions for judgment on the pleadings on three questions, asking whether any part of 950 C.M.R. § 12.207 (1) exceeds the authority that the Legislature delegated to the Secretary; (2) is an exercise of legislative authority in violation of art. 30 of the Massachusetts Declaration of Rights; or (3) is preempted by Federal law. See Docket No. 25.

The Secretary moved for partial judgment on the pleadings, arguing that, first, he was within his delegated authority in promulgating the Fiduciary Duty Rule; second, that the legislative delegation of authority to him complied with Article 30; and third, that Fiduciary Duty Rule Section is not preempted by federal law. Robinhood opposed and cross-moved for partial judgment on the pleadings, asserting that Fiduciary Duty Rule exceeded the Secretary's authority under the statute and the Massachusetts Constitution; and that it conflicted with and therefore was preempted by federal law.

In consideration of the relevant facts, the parties' memoranda of law and oral arguments, and for the reasons that follow, the Court concludes that on the first issue, the Secretary's promulgation of the Fiduciary Duty Rule was beyond his authority. Because it reaches this conclusion, the Court need not reach the constitutional issue posed by the second question. See, e.g., Dinkins v. Massachusetts Parole Bd., 486 Mass. 605, 616 (2021) ("We do not decide constitutional questions unless they must necessarily be reached," quoting Manor v. Superintendent, Mass. Correctional Inst., Cedar Junction, 416 Mass. 820, 824 (1994)). Nor does the Court reach the preemption question.

In light of the above, the Court concludes that the Fiduciary Duty Rule is invalid. Accordingly, the Secretary's motion is **DENIED** and Robinhood's motion is **ALLOWED**. The Court further **DECLARES** that 950 C.M.R. § 12.207 (1) (A), and those sections implementing to it, Section 12.204 (1) (a) (4) and Section 12.204 (1) (a) (29), are unlawful. However, in light of the significant public policy concerns at issue in this case, the Court **STAYS** this Order for thirty days to permit the Secretary time to pursue an appeal.

APPLICABLE LEGAL STANDARD

In deciding a Rule 12 (c) motion, all facts pleaded by the nonmoving party must be accepted as true. Minaya v. Massachusetts Credit Union Share Ins. Corp., 392 Mass. 904, 905 (1984). For plaintiff to prevail, it must demonstrate that there are no disputed material facts and that it is entitled to judgment as a matter of law. See, e.g., Federated Mut. Ins. Co. v. Coyle Mech. Supply Inc., 983 F.3d 307, 313 (7th Cir. 2020) ("When a plaintiff moves for judgment on the pleadings, the motion should not be granted unless it appears beyond doubt that the nonmovant cannot prove facts sufficient to support its position, and that the plaintiff is entitled to relief. Thus to succeed, the moving party must demonstrate that there are no material issues of fact to be resolved ... view[ing] all facts and inferences in the light most favorable to the non-moving party.") (citations, internal quotation marks omitted). "A defendant's rule 12(c) motion is 'actually a motion to dismiss ... [that] argues that the complaint fails to state a claim upon which relief can be granted.'" Jarosz v. Palmer, 436 Mass. 526, 529–530 (2002) (citation omitted). To prevail on a motion to dismiss, the defendant must show that the facts alleged in the complaint, taken as true, and drawing all reasonable inferences in plaintiff's favor, would not "plausibly suggest[] ... an entitlement to relief." Lopez v. Commonwealth, 463 Mass. 696, 701 (2012), quoting Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008); see also Golchin v.

Liberty Mut. Ins. Co., 460 Mass. 222, 223 (2011) (in deciding defendants' Rule 12(b)(6) motion, the court assumes the truth of the facts alleged in the complaint and any reasonable inference that may be drawn in plaintiff's favor from those allegations).

FACTS

A. Overview of the Relevant Securities Business

In the United States, individuals can obtain investment services from brokerage firms (technically called "broker-dealers") or from investment advisers. As the SEC has summarized, "[b]oth investment advisers and broker-dealers play an important role in our capital markets and our economy more broadly. Investment advisers and broker-dealers have different types of relationships with investors, offer different services, and have different compensation models. This variety is important because it presents investors with choices regarding the types of relationships they can have, the services they can receive, and how they can pay for those services." Commission Interpretation Regarding Standard of Conduct for Investment Advisors, Release No. IA-5248, 84 Fed. Reg. 33669, 33669 (July 12, 2019).

Insofar as their relationships involve retail customers, broker-dealers typically earn transaction-based compensation by charging commissions from client transactions and/or receiving payments for the orders that clients place with other market participants (often referred to as "payment for order flow"). Investment advisers, on the other hand, usually charge a monthly or quarterly fee calculated as a percentage of customer assets under the adviser's management. Brokerage firms are typically less expensive.

Certain customers of broker-dealers neither seek nor receive any advice or recommendations about securities transactions but instead make their own investment decisions and then direct their broker-dealer to effect the transactions that they have selected. These

customers are often termed "self-directed" investors because they make their own investment decisions and their trades are not recommended or solicited by the broker-dealer who executes them. Self-directed broker dealers are not supposed to make recommendations to self-directed investors about what securities to buy or sell or when to buy or sell.

B. The SEC's Regulation Best Interest

In Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), Congress authorized the SEC to

> promulgate rules to provide that the standard of conduct for all brokers, dealers, and investment advisers, when providing personalized investment advice about securities to retail customers (and such other customers as the Commission may by rule provide), shall be to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice. In accordance with such rules, any material conflicts of interest shall be disclosed and may be consented to by the customer. Such rules shall provide that such standard of conduct shall be no less stringent than the standard applicable to investment adviser[s] under sections 206(1) and (2) of this Act when providing personalized investment advice about securities ...

Public Law 111-203, July 21, 2010, 124 Stat 1376, codified at 15 U.S.C.A. § 80b-11 (g) (1).

After conducting a study and engaging in a public rulemaking debate, the SEC promulgated Regulation Best Interest ("Reg BI") in 2019. Reg BI establishes a "best interest" standard of conduct for broker-dealers and associated persons when making a recommendation to a retail customer regarding a securities transaction or investment strategy involving securities.

In adopting Reg BI, the SEC "declined to subject broker-dealers to a wholesale and complete application of the existing fiduciary standard under the Advisers Act because it is not appropriately tailored to the structure and characteristics of the broker-dealer business model (i.e., transaction-specific recommendations and compensation), and would not properly take into account, and build upon, existing obligations that apply to broker-dealers ... Moreover, we believe (and our experience indicates), that this approach would significantly reduce retail

investor access to differing types of investment services and products, reduce retail investor choice in how to pay for those products and services, and increase costs for retail investors of obtaining investment recommendations." Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 FR 33322 (footnotes omitted).

> In summary, Reg BI requires broker-dealers to do the following:
>
> When making such a recommendation to a retail customer, you must act in the best interest of the retail customer at the time the recommendation is made, without placing your financial or other interest ahead of the retail customer's interests.
>
> This ***general obligation*** is satisfied only if you comply with four specified ***component obligations***:
>
> - ***Disclosure Obligation***: provide certain required disclosure before or at the time of the recommendation, about the recommendation and the relationship between you and your retail customer;
> - ***Care Obligation***: exercise reasonable diligence, care, and skill in making the recommendation;
> - ***Conflict of Interest Obligation***: establish, maintain, and enforce written policies and procedures reasonably designed to address conflicts of interest; and
> - ***Compliance Obligation***: establish, maintain, and enforce written policies and procedures reasonably designed to achieve compliance with Regulation Best Interest.
>
> **Record-making and Recordkeeping:** You must also comply with new record-making and recordkeeping requirements.

See Regulation Best Interest, A Small Entity Compliance Guide (emphasis in original).[3]

During the debate on Reg BI, the Secretary was a proponent of a "uniform fiduciary standard" for broker-dealers. When Reg BI was initially proposed in 2018, the Secretary objected because it did not subject broker-dealers to a uniform fiduciary standard. In August 2018, the Secretary wrote a letter to the SEC Commissioners. In part, the letter stated:

[3] Available at https://www.sec.gov/info/smallbus/secg/regulation-best-interest.

> The Proposals address the most fundamental of investor protection issues: the duties that providers of investment advice owe their customers and clients. As a regulator, I have seen the grievous harm suffered by Main Street investors who mistakenly trusted and relied on conflicted investment advice. The Commission now has the opportunity of a generation to protect them. Unfortunately, the Proposals are inadequate to provide this protection. I urge the Commission to replace the current Proposals with a strong uniform fiduciary standard, comparable to the standard applicable under the Investment Advisers Act of 1940, that will apply to advice provided to retail investors by both investment advisers and broker-dealers. If the Commission does not adopt a strong and uniform fiduciary standard, Massachusetts will be forced to adopt its own fiduciary standard to protect our citizens from conflicted advice by broker-dealers. ...
>
> [I]t is evident that the Commission has abandoned a fiduciary standard in the name of choice and the preservation of the broker-dealer advice model. The Commission should not move away from a true fiduciary standard based on a spurious claim of investor choice. We urge the Commission to reject the status quo and to upgrade the Proposals to a true fiduciary investor protection standard. The Commission has shaped its "best interest" regulation to preserve the traditional broker-dealer advice model, with investor protection taking a back seat....

Letter from Sec. William Galvin to SEC Chairman Clayton (Aug. 7, 2018), at 1, 4.[4]

On June 5, 2019, the SEC announced the final version of Reg BI, which, in effect, rejected the Secretary's suggestion.

C. The Fiduciary Duty Rule

Nine days after the SEC announced the final version of Reg BI, on June 14, 2019, the Secretary proposed an initial version of the Fiduciary Duty Rule. See Massachusetts Securities Division, Preliminary Solicitation of Public Comments: Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives (June 14, 2019).[5] The Secretary's proposal criticized Reg BI because, in the Secretary's view, it "fails to establish a strong and uniform fiduciary standard." Id.

On December 13, 2019, the Secretary solicited comments on a revised version of the Fiduciary Duty Rule. See Massachusetts Securities Division, Solicitation of Comments on

[4] Available at https://www.sec.state.ma.us/sct/sctpdf/SECCommissioners.pdf.
[5] Available at https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/fiduciaryconductstandardidx.htm.

Proposed Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives (Dec. 13, 2019).[6] In his Request for Comment, the Secretary noted that despite Congressional direction in Section 913 of Dodd-Frank that the SEC establish a fiduciary duty for broker-dealers and their agents, the SEC did not do so in Reg BI. Request for Comment, at 2.[7] In the Secretary's view,

> Reg BI sets ambiguous requirements for how longstanding and harmful conflicts in the securities industry must be addressed. Further, Reg BI is overly focused on complicated disclosures, and permits the continuation of harmful practices such as sales quotas and broad-based sales contests. In many instances, it appears that the mitigation of conflicts required under Reg BI can be accomplished through disclosure alone.
>
> This approach contradicts years of data and will not protect investors from harmful conflicts. ... While disclosure can be helpful to some investors, it cannot replace a clear fiduciary standard.

Id. at 2-3 (footnote omitted).

The Secretary rejected preliminary comments objecting to the Fiduciary Duty Rule, and specifically rejected deferring to the standard articulated in Reg BI because,

> Reg BI fails to provide investors the protection they need from harmful conflicts of interest. The critical term 'best interest' is not defined in Reg BI, and the rule focuses far too heavily on disclosure through Form CRS. In many cases, it appears that compliance with Reg BI may be accomplished primarily or exclusively via disclosure ... [which is] the second-best option relative to eliminating the impact of conflicts. A fiduciary standard is necessary to ensure that financial advice be based on what is best for investors.

Id. at 3. The Secretary further dismissed concerns that imposing the Fiduciary Duty Rule would create a "regulatory labyrinth," and turned away suggestions that he postpone taking action and wait to coordinate with other federal and state regulators, explaining:

> The Division's primary responsibility is to investors in Massachusetts. The SEC's Reg BI is insufficient to protect those investors from harmful conflicts of interest. **The Division hopes that other state regulators, and potentially the SEC, will eventually establish a**

[6] Available at https://www.sec.state.ma.us/sct/sctfiduciaryconduct standard/ fiduciaryruleidx.htm.
[7] Available at https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/Request-for-Public-Comment.pdf.

true fiduciary standard for all investment advice. Until then, the Division has a duty to take the necessary steps to protect Massachusetts investors.

Several commenters wrote that the establishment of *any* state fiduciary standard conflicts with Reg BI and that the Division should not proceed with a formal regulation. The Division disagrees. Reg BI "sets a federal floor, not a ceiling, for investor protection."[8] If the purpose and objective of Reg BI is truly to enhance the standard for investment advice and improve investor outcomes, the more rigorous fiduciary standard does not prevent or frustrate that purpose. ...

[O]thers wrote that the Division should wait to coordinate with other federal and state regulators. The Division believes that it is both necessary and appropriate to impose a true, uniform fiduciary standard now.

The Division has been careful and deliberate in its approach to the Proposal. The Division did not propose its own fiduciary standard until after the SEC declined to adequately enhance Reg BI. Despite Secretary William Galvin's comments on August 7, 2018, and comments from several others urging the SEC to adopt a strong, fiduciary standard, the SEC's final version of Reg BI is too weak to truly protect investors from harmful conflicts of interest.

Id. at 4 (footnote omitted, emphasis added)

The Secretary's proposal generated more than 600 comment letters. One comment came from the Governor, who wrote:

> Based on feedback provided in public comments and directly to my Administration, we are concerned the draft regulation may create confusion. The draft regulation does not appear to sufficiently account for differences in the industry, inadequately defines key terms and how regulated entities can resolve potential conflicts of interest, and departs from federal regulations and regulations adopted in other states. In short, we fear the draft regulation may create more confusion rather than more clarity in the industry and for investors.
>
> Specifically, we are concerned the current draft of the regulation could ... [h]arm the business models of broker-dealers, which are legal, and who are significant employers in Massachusetts and put such employers here at a competitive disadvantage with other states ....

[8] For this point, the Secretary cited Commissioner Robert J. Jackson Jr., Statement on Final Rules Governing Investment Advice (Jun. 5, 2019), available at https://www.sec.gov/news/public-statement/statement-jackson-060519-iabd. Commissioner Jackson' Statement was issued in dissenting from the SEC's adoption of Reg BI.

Letter from Gov. Charles D. Baker to Sec. William Galvin (Jan. 7, 2020) at 1.[9]

On March 6, 2020, following consideration of commentary submitted by the securities industry and other market participants and after making certain revisions, the Secretary announced the adoption of the Fiduciary Duty Rule, which has been codified at 950 C.M.R. § 12.207. In it, the Secretary adopted a fiduciary standard under which broker-dealers have fiduciary obligations when providing investment advice or recommendations to their customers. See Massachusetts Securities Division, Adoption of Amendments to Fiduciary Conduct Standard Regulations (Mar. 6, 2020).[10] In his Adopting Release, the Secretary explained that "Section 12.207 of the Final Regulations will hold broker-dealers and agents to a fiduciary standard of conduct when making recommendations and providing investment advice to customers." Adopting Release (Feb. 21, 2020), at 2.[11]

In part, Section 12.207 provides:

> (l) The following practices are a non-exclusive list of practices by a broker-dealer or agent which shall be deemed "unethical or dishonest conduct or practices" for purposes of M.G.L. c. 110A, § 204(a)(2)(G):[12]
>
> > (a) Failing to act in accordance with a fiduciary duty to a customer when providing investment advice or recommending an investment strategy, the opening of or transferring of assets to any type of account, or the purchase, sale, or exchange of any security.
> >
> > (b) Failing to act in accordance with a fiduciary duty to a customer during any period in which the broker-dealer or agent:
> >
> > > 1. Has or exercises discretion in a customer's account, unless the discretion relates solely to the time and/or price for the execution of the order;
> > >
> > > 2. Has a contractual fiduciary duty; or

[9] Available at https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/comments/2020-01-07-Governor-Charles-D.-Baker.pdf.
[10] Available at https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/fiduciaryrule-adoption.htm.
[11] Available at https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/Adopting-Release.pdf.
[12] Section 204(a)(2)(G) permits the Secretary to impose sanctions against a broker-dealer for "engag[ing] in any unethical or dishonest conduct or practices in the securities, commodities or insurance business"

3. Has a contractual obligation to monitor a customer's account on a regular or periodic basis, as such regular or periodic basis is determined by agreement with the customer.

(2) To meet the fiduciary duty, each broker-dealer or agent shall adhere to duties of utmost care and loyalty to the customer.

(a) The duty of care requires a broker-dealer or agent to use the care, skill, prudence, and diligence that a person acting in a like capacity and familiar with such matters would use, taking into consideration all of the relevant facts and circumstances. For purposes of 950 CMR 12.207(2), a broker-dealer or agent shall make reasonable inquiry, including:

1. The risks, costs, and conflicts of interest related to all recommendations made and investment advice given;

2. The customer's investment objectives, risk tolerance, financial situation, and needs; and

3. Any other relevant information.

(b) The duty of loyalty requires a broker-dealer or agent to:

1. Disclose all material conflicts of interest;

2. Make all reasonably practicable efforts to avoid conflicts of interest, eliminate conflicts that cannot reasonably be avoided, and mitigate conflicts that cannot reasonably be avoided or eliminated; and

3. Make recommendations and provide investment advice without regard to the financial or any other interest of any party other than the customer.

(c) Disclosing conflicts alone does not meet or demonstrate the duty of loyalty.

(d) It shall be presumed to constitute a breach of the duty of loyalty for a broker-dealer or agent to recommend any investment strategy, the opening of or transferring of assets to a specific type of account, or the purchase, sale, or exchange of any security, if the recommendation is made in connection with any sales contest.

950 C.M.R. § 12.207.

As noted above, the Secretary promulgated § 12.207 pursuant to G. L. c. 110A, § 412. Section 412 permits the Secretary to adopt rules "defining any terms," including the term "unethical or dishonest conduct or practice" found G. L. c. 110A, § 204 (a) (2) (G).

Section 12.207, as revised, became effective on March 6, 2020, and enforcement began on September l, 2020.

D. Robinhood

Robinhood is registered as a broker-dealer (and not an investment adviser) with the Secretary, the SEC and the Financial Industry Regulatory Authority. As of December 8, 2020, Robinhood had approximately 500,000 accounts with Massachusetts customers.

Robinhood offers commission-free trading for stocks and options, does not require account minimums, and interacts with its customers through its website and mobile application. In lieu of commissions, Robinhood draws revenue from other sources, including payments for order flow. By eliminating commissions, Robinhood has eliminated a cost of investing. Until recently, many brokerage firms required customers to pay commissions to trade securities while also receiving payment for order flow. For example, historically a broker-dealer might charge a client a brokerage commission (sometimes termed a "mark-up") of one-percent of the purchase price, or $0.25 per share, or $10.00 per trade. That same broker-dealer would also receive payments for order flow from a market maker. By not charging commissions, Robinhood has attracted clients of relatively lesser financial means.

Robinhood is subject to MUSA. Under MUSA, it is illegal for a broker-dealer to engage in "unethical or dishonest conduct or practices." See G. L. c. 110A § 204 (a) (2) (G). It is also unlawful for a broker-dealer to fail reasonably to supervise its employees and other agents "to assure compliance with" MUSA. Id. at § 204 (a) (2) (J). If the Secretary finds that a broker-dealer has committed such violations, he may through administrative action impose a fine, suspend or revoke the broker-dealer's registration, or take any other appropriate action. Id. at § 204 (a).

E. The Administrative Complaint

On December 16, 2020, the Secretary filed an Administrative Complaint ("Admin. Compl.") against Robinhood, In the Matter of: Robinhood Financial LLC (Docket No. E-2020-0047), alleging that several aspects of Robinhood's business model are "dishonest and unethical." The Secretary alleges in the Administrative Complaint that Robinhood violated the new Fiduciary Duty Rule (Count II)[13] and had failed to supervise its employees (Count III). Based on the same alleged facts, the Secretary also charges Robinhood with having engaged in unethical or dishonest conduct (Count I). Specifically, the Secretary alleges that Robinhood, among other things, encouraged trading by its customers by providing lists of securities, including the most popular or most traded securities by its customers, which was tantamount to "ma[king] ... recommendations to the customer." Id. at 5. Additionally, it alleged that Robinhood "encourage[ed] constant engagement [of its customers] with its platform ... [and] failed to properly screen customer profiles and allowed thousands of inexperienced investors to engage is very risky trading activity." Id. at 5. The Secretary further alleged that:

> [Robinhood's] business model and lack of adequate procedures has put both customers and their assets at risk. By doing so, Robinhood has failed to comply with [the Fiduciary Duty Rule]. ... For years, Robinhood has unscrupulously engaged in conduct that exposes Massachusetts investors to potential harm. Specifically, Robinhood has: targeted young individuals with little or no investment experience; lacked adequate infrastructure and, as a result, experienced repeated outages and disruptions on its trading platform; used gamification strategies to manipulate customers into continuous interaction and constant engagement with its application; encouraged inexperienced investors to execute trades frequently; and failed to follow its own written supervisory procedures when approving customers for options trading. This behavior continued unabatedly ever since adoption of the [Fiduciary Duty Rule] in Massachusetts. These actions do not represent the behavior of a fiduciary and are inconsistent with the duty Robinhood owes Massachusetts investors.

[13] The Administrative Action was the first enforcement action taken by the Secretary against a brokerage firm under the new the Fiduciary Duty Rule.

Id. at 6-7. The Administrative Complaint also alleged that, after the adoption of the Fiduciary Duty Rule, Robinhood failed to consider its customer's investment experience or objectives when "providing lists [of securities being purchased through its website] to encourage customers to purchase securities without any consideration of suitability"; employed strategies to facilitate unsuitable trading; and failed to act in the best interests of its customers. Id. at 19-20.[14]

DISCUSSION

DOES THE SECRETARY HAVE THE AUTHORITY TO PROMULGATE SECTION 12.207 UNDER G. L. c. 110A, § 412?

Robinhood claims that the Fiduciary Duty Rule imposes a duty not recognized at common law as outlined by the Supreme Judicial Court in Patsos v. First Albany Corp., 433 Mass. 323, 333-336 (2001). Robinhood also claims that the Statute, G. L. c. 110A, § 412, does not give the Secretary authority to change the common law.

The parties agree that under current common law, Patsos defines the scope of a broker-dealer's fiduciary responsibility, if any, to its customer. In that case, the Supreme Judicial Court determined that whether a broker-dealer bore fiduciary obligations was based on the measure of discretion it exercised on behalf of a customer:

> In determining the scope of the broker's fiduciary obligations, courts typically look to the degree of discretion a customer entrusts to his broker. Where the account is "non-discretionary," meaning that the customer makes the investment decisions and the stockbroker merely receives and executes a customer's orders, the relationship generally does not give rise to general fiduciary duties. See, e.g., Independent Order of Foresters v. Donald, Lufkin & Jenrette, Inc., 157 F.3d 933, 940–941 (2d Cir.1998) ("Under New York law, as generally, there is no general fiduciary duty inherent in an ordinary broker-customer relationship.... [A general fiduciary] duty can arise only where the customer has

[14] The parties dispute whether Robinhood provides advice or is a "self-directed broker-dealer." Contrary to the Secretary's contention (see Defendants' Opposition, Docket No. 36, at 1-2), this dispute, while central to the Administrative Action, is not material to either motion here. The Secretary alleges in the Administrative Action that the Fiduciary Duty Rule applies to Robinhood, in part because the Secretary contends that Robinhood effectively gave advice to its customers and thereby became subject to fiduciary obligations under the Fiduciary Duty Rule. Because that is so, it does not matter for purposes of this action whether the Secretary's factual allegations are correct; what matters is that the Fiduciary Duty Rule is alleged in the Administrative Action as a basis for the Secretary's claims against Robinhood, making the validity of the Fiduciary Duty Rule a live issue for this Court.

delegated discretionary trading authority to the broker"). See also Carr v. CIGNA Secs., Inc., 95 F.3d 544, 547 (7th Cir.1996); Greenwood v. Dittmer, 776 F.2d 785, 788 (8th Cir.1985). For nondiscretionary accounts, each transaction is viewed singly, the broker is bound to act in the customer's interest when transacting business for the account, but all duties to the customer cease "when the transaction is closed." Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 461 F. Supp. 951, 952–953 (E.D.Mich.1978), aff'd, 647 F.2d 165 (6th Cir.1981). See Hill v. Bache Halsey Stuart Shields, Inc., [790 F.2d 817] at 824 [(10th Cir.1986)] (in nondiscretionary accounts broker owes only a narrow duty not to make unauthorized trades).

Conversely, where the account is "discretionary," meaning that the customer entrusts the broker to select and execute most if not all of the transactions without necessarily obtaining prior approval for each transaction, the broker assumes broad fiduciary obligations that extend beyond individual transactions. See, e.g., Carr v. CIGNA Secs., Inc., supra at 547 ("The general rule ... is that a broker is not the fiduciary of his customer unless the customer entrusts him with discretion to select the customer's investments"); Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra at 953. But see Romano v. Merrill Lynch, Pierce, Fenner & Smith, [834 F.2d 523] at 530 [(5th Cir.1987), cert. denied, 487 U.S. 1205 (1988)] (there is no "bright-line" distinction between the fiduciary duty owed customers in discretionary as opposed to nondiscretionary accounts). Trading by the broker without the customer's prior approval suggests that an account is discretionary, while frequent communications between the parties about the prudence of various transactions may support a finding that a customer has retained control of his account. Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra at 954. If a broker has acted as an investment advisor, and particularly if the customer has almost invariably followed the broker's advice, the fact finder may consider this as evidence that the relationship is discretionary. Leboce, S.A. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 709 F.2d 605, 607–608 (9th Cir.1983). Courts have looked to both the documentation of the customer's account, as well as to the execution of particular account transactions, to determine whether the customer has entrusted a broker to manage his investments for his benefit. Paine, Webber, Jackson & Curtis, Inc. v. Adams, [718 P.2d 508] at 516 [(Colo.1986)].

Other factors may also support a finding that a stockbroker has assumed general fiduciary obligations to a customer. A customer's lack of investment acumen may be an important consideration, where other factors are present. See, e.g., Broomfield v. Kosow, 349 Mass. 749, 755 (1965); Birch v. Arnold & Sears, Inc., 288 Mass. 125, 129, 136 (1934); Romano v. Merrill Lynch, Pierce, Fenner & Smith, supra at 530, citing Clayton Brokerage Co. v. Commodity Futures Trading Comm'n, 794 F.2d 573, 582 (11th Cir.1986) (trier of fact must consider "the degree of trust placed in the broker and the intelligence and personality of the customer"); Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra at 953, 954 (where customer is particularly young, old, or naive with regard to financial matters, courts are "likely" to find that broker assumed control over account). An inexperienced or naive investor is likely to repose special trust in his stockbroker because he lacks the sophistication to question or criticize the broker's advice or judgment. Paine, Webber, Jackson & Curtis, Inc. v. Adams, supra at 517. This may be particularly true

> where the broker holds himself out as an expert in a field in which the customer is unsophisticated. See, e.g., Burdett v. Miller, 957 F.2d 1375 (7th Cir.1992); Paine, Webber, Jackson & Curtis, Inc. v. Adams, supra at 517, citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Boeck, 127 Wis.2d 127, 145–146 (1985) (Abrahamson, J., concurring) ("[B]y gaining the trust of a relatively uninformed customer and purporting to advise that person and to act on that person's behalf, a broker accepts greater responsibility to that customer"). Social or personal ties between a stockbroker and customer may also be a consideration because the relationship may be based on a special level of trust and confidence. Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra at 954.
>
> We have considered these and similar facts relevant to determining the scope of duty that extends to a customer. Broomfield v. Kosow, supra at 755 ("review such factors as the relation of the parties prior to the incidents complained of," as well as "the readiness of the plaintiff to follow the defendant's guidance in complicated transactions wherein the defendant has specialized knowledge"). But we have also held that a business relationship between a broker and customer does not become a general fiduciary relationship merely because an uninformed customer reposes trust in a broker who is aware of the customer's lack of sophistication. See Snow v. Merchants Nat'l Bank, 309 Mass. 354, 360–361 (1941) (bank that conducted hundreds of securities transactions for elderly widow uninformed in financial matters could not reasonably have been considered to have acted as fiduciary because customer's mere trust or reliance not enough to establish a fiduciary relationship). Cf. Broomfield v. Kosow, supra at 755 (catalyst in transformation of business relationship into fiduciary relationship is defendant's knowledge of plaintiff's reliance upon him). In this respect, as others, our law is consistent with other States. See, e.g., Hill v. Bache Halsey Stuart Shields, Inc., supra at 824 ("A fiduciary duty ... cannot be defined by asking the jury to determine simply whether the principal reposed 'trust and confidence' in the agent").

Patsos, 433 Mass. at 333–336 (footnotes omitted). For the Court, a broker-dealer's fiduciary obligations only arose in limited circumstances because the Court

> recognize[d] ... two potentially competing considerations: the need to protect customers who relinquish control of their brokerage accounts, and the need to ensure that securities brokers—particularly those who merely execute purchase and sell orders for customers—not become insurers of their customers' investments. Assigning general fiduciary duties only to those stockbrokers who have the ability to, and in fact do, make most if not all of the investment decisions for their customers properly provides appropriate protection only for those customers who are particularly vulnerable to a broker's wrongful activities.

Id. at 336.

At argument, the Secretary suggested that there was no conflict between the Fiduciary Duty Rule and Patsos, asserting that the Fiduciary Duty Rule was "consistent" with Patsos

because "the Secretary was very careful and very precise in adopting a very narrow regulation that says the triggering event ... is if you provide advice and recommendations." Transcript, Dec. 2, 2021, Hearing ("Tr."), at 1-11; see also 1-38 -1-39, 1-68 (Robinhood arguing that a broker-dealer who makes recommendations to a client is subject to fiduciary obligations imposed pursuant to the Fiduciary Duty Rule, which was not the case under Patsos). But this is not the line drawn in Patsos. There, the distinction between broker-dealers who bore fiduciary obligations and those that did not turn on the broker-dealer's relationship with the customer and focused on the broker-dealer's level of discretion;[15] accordingly, Patsos held that it was appropriate to assign those broker-dealer fiduciary obligations because they could and did make investment decisions for their customers and were thus in position to wrongfully exercise that discretion to the detriment of the investor, whereas "under Massachusetts law, a simple broker-customer relationship is not fiduciary in nature, even if the broker has encouraged the trust of an unsophisticated customer." Patsos, 433 Mass. at 330.

The Fiduciary Duty Rule does not track Patsos. Under the Fiduciary Duty Rule, a broker-dealer is subject to fiduciary duties when it "provid[es] investment advice or recommend[s] an investment strategy, the opening of or transferring of assets to any type of account, or the purchase, sale, or exchange of any security." The Adopting Release draws this line, too, making the key criterion for the application of the fiduciary standard the broker-dealer's making recommendations or providing investment advice to a customer. In short, broker-dealers who are not subject to fiduciary obligations under Patsos may be subject to them under the Fiduciary Duty Rule. Because the Fiduciary Duty Rule imposes a fiduciary duty on broker-dealers even where they lack the type of relationship described in Patsos as triggering a

[15] The broker-dealer's discretion is addressed in Section 12.207 (a) (2), a part of the regulation not in dispute here.

fiduciary duty, it expands the universe of broker-dealers subject to fiduciary obligations beyond those subject to such duties under Patsos. The Fiduciary Duty Rule thus changes the common law as defined by the Supreme Judicial Court in Patsos and provides grounds for the Secretary's claims against Robinhood.[16]

Robinhood does not contest that the Secretary generally has been delegated the authority to define what are dishonest and unethical practices in the securities business, and acknowledges that he has done so in 950 C.M.R. § 12.204 (1) (a) (1) - (28), nor contests, preemption arguments aside, that the Legislature could have amended MUSA to adopt, or to permit the Secretary to adopt, the Fiduciary Duty Rule. Tr. at 1-45 - 1-46. Its claim is that the Secretary cannot re-define as an unethical and dishonest practice non-fiduciary activities of a broker-dealer that are lawful under Patsos. See Tr. at 1-39 - 1-40. The question, then, is whether the Secretary can impose otherwise inapplicable fiduciary duties on broker-dealers duties by regulation and, in doing so, override the common law as expressed in Patsos.

At argument, the Secretary was unable to cite a case holding that an executive agency could by regulation override the common law as defined by the Supreme Judicial Court. The contrary appears to be the case. The Secretary concedes that the "common law ... is of 'equal and binding force' to laws enacted by the Legislature," Commonwealth v. Adams, 482 Mass. 514, 517-518 (2019), and no case suggests an agency is free to disregard such law. Cf. Telles v. Commissioner of Insurance, 410 Mass. 560, 564 (1991) (citation omitted) ("[i]t is settled that a "an administrative board or officer has no authority to promulgate rules and regulations which are in conflict with the statutes ...").

[16] In the Administrative Action, the Secretary does not contend that Robinhood's customers have relinquished control of their brokerage accounts to Robinhood, or that Robinhood has the ability to, and in fact does, make most if not all of the investment decisions for its customers, as the Patsos Court emphasized.

The Secretary argued that the Court had to weave his authority to promulgate the Fiduciary Duty Rule and override Patsos from three legal threads: first, that under Adams, 482 Mass. at 517-518, the common law is of equal status to laws enacted by the Legislature; second, that under Chelmsford Trailer Park Inc. v. Chelmsford, 393 Mass. 186, 190 (1984), the Legislature can delegate "the implementation of legislatively determined policy" to an agency; and third, that under Borden, Inc. v. Commissioner of Pub. Health, 388 Mass. 707, 723 (1983) (and other cases), "a properly promulgated regulation has the force of law." Defendants' Memo (Docket No. 33) at 4; Defendants' Opposition (Docket No. 36), at 4; Tr. at 1-12 - 1-14. In sum, the Secretary contends that "[o]ne of the ways the Legislature can alter the common law is through delegation of rulemaking authority to administrative agencies, which rules, once promulgated, have the 'force of law'... and are the equivalent of a statute." See Defendant's Memo (Docket No. 33) at 4.

Even assuming this accurately states the law, the Secretary's argument still fails. Leaving the constitutional validity of any delegation aside, the question is whether the Legislature delegated authority to the Secretary to interpret MUSA contrary to the Supreme Judicial Court's interpretation. Nothing in the statute expressly confers such a delegation; indeed, the statutory provisions on which the Secretary relies are the same ones that existed at the time Patsos was decided, evidencing that no specific delegation was made.

The Secretary's argument that such a delegation can be implied from the statute is unconvincing. Generally, courts presume that the Legislature does not intend to displace the common law. That is, had the Legislature taken direct action that created an apparent conflict with the common law, the Court would "assume that the Legislature d[id] not depart from settled law without clearly indicating its intent to do so," Commonwealth v. G.F., 479 Mass. 180

(2018), and would not construe any statute "as effecting a material change in or a repeal of the common law unless the intent to do so is clearly expressed." Suffolk Const. Co. v. Div. of Cap. Asset Mgmt., 449 Mass. 444, 454 (2007), quoting Riley v. Davison Constr. Co., 381 Mass. 432, 438 (1980). MUSA does not reflect a clear Legislative intent to override Patsos directly, much less to empower the Secretary to do so indirectly through delegated rulemaking. Indeed, with respect to Reg BI, the SEC acted upon the express direction of Congress, an express legislative direction that is absent here.[17]

Moreover, the language of MUSA cannot fairly be read to implicitly confer on the Secretary the authority to promulgate the Fiduciary Duty Rule under these facts. When assessing the validity of a regulation like the Fiduciary Duty Rule, the Court

> look[s] first to the language of the statute and, where it speaks clearly on the topic in the regulation, [the Court] determine[s] whether the regulation is consistent with or contrary to the statute's plain language. Where the statute relevant to the regulation is ambiguous or where there is a gap in the statutory guidance, [the Court] determine[s] whether the regulation may "be reconciled with the governing legislation." In doing so, "[the Court] accord[s] 'substantial deference' to the agency charged with interpreting and administering the statute in question, and do not invalidate regulations unless 'their provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate.'" "But deference does not suggest abdication; '[a]n incorrect interpretation of a statute ... is not entitled to deference.'"

Buckman v. Commissioner of Corr., 484 Mass. 14, 23–24 (2020) (citations omitted); see also Massachusetts Teachers' Ret. Sys. v. Contributory Ret. Appeal Bd., 466 Mass. 292, 301 (2013)

[17]Albeit in a different context, Chamber of Com. of United States of Am. v. United States Dep't of Lab. concluded that a federal agency was not empowered to re-define the scope of fiduciary duty in the absence of express legislative direction. See 885 F.3d 360, 381–82 (5th Cir. 2018), judgment entered sub nom. Chamber of Com. of Am. v. United States Dep't of Lab., No. 17-10238, 2018 WL 3301737 (5th Cir. June 21, 2018). Its reasoning is helpful here. In that case, business groups sued the United States Department of Labor ("DOL") which, under a revised regulation sought to re-define the scope of fiduciary duties imposed on financial services providers and insurance companies that had up to then not been subject to fiduciary obligations under the Employment Retirement Investment Security Act. The Fifth Circuit concluded that DOL did not have statutory authority to make such a change, reasoning, in part, that Congress intended to codify the concept as one based on a "relationship of trust and confidence" and that permeated the financial industry, and had it intended to abrogate that "cornerstone" understanding, "one would reasonably expect Congress to say so." 885 F.3d at 368-376.

("Only an agency regulation that is contrary to the plain language of the statute and its underlying purpose may be rejected by the courts.") (internal quotations omitted). The Court looks to all of the language of a statute, "not just a single sentence, and attempt[s] to interpret all of its terms harmoniously to effectuate the intent of the Legislature." Cuticchia v. Town of Andover, 95 Mass. App. Ct. 121, 125 (2019) (internal quotations omitted). "Beyond plain language, '[c]ourts must look to the statutory scheme as a whole,' so as 'to produce an internal consistency' within the statute ... Even clear statutory language is not read in isolation." Plymouth Ret. Bd. v. Contributory Ret. Appeals Bd., 483 Mass. 600, 605 (2019) (citations omitted). See also 81 Spooner Rd. LLC v. Brookline, 452 Mass. 109, 113 (2008), quoting Hanlon v. Rollins, 286 Mass. 444, 447 (1934) ("A statute must be construed 'according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.'"). Here, the precise question is whether the Statute, G. L. c. 110A, § 412, coupled with the other provisions of and statutory scheme reflected in MUSA, implicitly authorizes the Secretary to promulgate the Fiduciary Duty Rule.

The Statute, G. L. c. 110A, § 412, states as follows:

> (a) The secretary may ... make ... rules ...as are **necessary to carry out the provisions of this chapter, including ... defining any terms ... insofar as the definitions are not inconsistent with the provisions of this chapter. ...**
>
> (b) No rule ... may be made ... unless the secretary finds that the action is **necessary or appropriate in the public interest or for the protection of investors and consistent with the purposes fairly intended by the policy and provisions of this chapter**. In prescribing rules ... the secretary may cooperate with the securities administrators of the other states and the Securities and Exchange Commission with a view to effectuating the policy of this statute to achieve maximum uniformity in the form and content of registration statements, applications, and reports wherever practicable.

G. L. c. 110A, § 412 (emphasis added). Reading these provisions in harmony, the Secretary is authorized to define terms when doing so is necessary, appropriate, and consistent with the purpose, policy, and provisions of Chapter 110A.

The Secretary's argument that this section of MUSA confers upon him the power to promulgate rules "as are necessary to carry out the provisions of this chapter ... for the protection of investors," and therefore has the authority to promulgate the Fiduciary Duty Rule, is an excessive reading of the delegation contained in the statute. It is true that "[w]hen the Legislature vests an agency with broad authority to effectuate the purposes of an act, the validity of a regulation promulgated thereunder will be sustained so long as it is reasonably related to the purposes of the enabling legislation." Ciampi v. Commissioner of Correction, 452 Mass. 162, 168 (2008) (internal quotations, citation omitted). But such language, which is common in agency delegations, does not mean that the agency has been delegated unfettered authority to adopt any regulation that the agency concludes is generally consistent with the underlaying statute. See, e.g., Commonwealth v. Maker, 459 Mass. 46, 49–50 (2011) (concluding that a regulation adopted by the Sex Offender Registry Board (SORB) pursuant to a statutory delegation to "promulgate rules and regulations to implement the provisions of" the statute that imposed requirements on sex offenders not found in the statute exceeded SORB's authority).[18] The touchstone remains the Legislature's intent in conferring rulemaking authority to the agency.

[18] Although the Court does not reach the constitutionality of the delegation that the Secretary claims, the Court nonetheless notes that the Legislature cannot constitutionally delegate the making of fundamental policy decisions, but only the implementation of legislatively determined policy. See Chelmsford, 393 Mass. at 190. Here, in the Secretary's view, the Legislature delegated to him the authority to re-define the common law as reflected in Patsos, an issue of policy as determined by a co-equal branch of government, the judicial branch. Moreover, the Secretary's view of that issue would be the last word as to the scope of fiduciary duties borne by broker-dealers, rendering any judicial review largely meaningless. In short, the delegation claimed by the Secretary would be a final policy determination, evidently conferring on the Secretary "unbridled power to regulate ...[that] can be subject to no meaningful review." Chelmsford, 393 Mass. at 191.

Here, the Legislature, in three parts of MUSA, directed the Secretary to maintain consistency in the securities laws among with Massachusetts, the federal government, and the other states which have adopted the Uniform Securities Act that was the foundation for MUSA. Specifically, Section 412 (a) authorized the Secretary to define terms "insofar as the definitions are not inconsistent with the provisions of this chapter." Section 412 (b) requires that any regulation be "consistent with the purposes fairly intended by the policy and provisions of this chapter" and encourages the Secretary to "cooperate with the securities administrators of the other states and the Securities and Exchange Commission with a view to effectuating the policy of this statute to achieve maximum uniformity" on administrative matters. Section 415 requires that MUSA "be so construed to effectuate its general purpose to make uniform the law of those states which enact it and coordinate the interpretation and administration of this chapter with the related federal regulation." Taken together, these provisions make clear that the Legislature directed the Secretary to strive for uniformity in the securities laws, and not to create conflict in this area. See Marram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43, 50–51 (2004) ("The Legislature has directed that we interpret [MUSA] in coordination with the Securities Act of 1933," citing G. L. c. 110A, § 415 and Adams v. Hyannis Harborview, Inc., 838 F. Supp. 676, 684 n. 9 (D. Mass.1993) (Massachusetts securities laws 'are substantially similar to the Federal securities laws")).

The Fiduciary Duty Rule runs directly contrary to this direction. It overrides the common law, as interpreted in Patsos, which recognized "general agreement [within the law] that the scope of a stockbroker's fiduciary duties in a particular case is a factual issue that turns on the manner in which investment decisions have been reached and transactions executed for the account." Patsos, 433 Mass. at 332. Further, the Secretary chose to promulgate the Fiduciary

Duty Rule, aware that it would create conflict with Reg BI -- and since the record supports a conclusion that the Secretary was alone in imposing the Fiduciary Duty Rule around the country, his interpretation likely conflicts with other states' laws, as well. Indeed, in his December 2019 Request for Comments, the Secretary embraced the conflict, writing that he hoped that "other state regulators, and potentially the SEC" would follow his lead, and elected not to wait to achieve "coordinat[ion] with other federal and state regulators," noting that it had proposed the Fiduciary Duty Rule only after the SEC rejected that approach in Reg BI. The Secretary's decision to reject any effort at coordinating with federal authority and that of other states is the opposite of the direction contained in MUSA and supports the conclusion that by adopting the Fiduciary Duty Rule, the Secretary acted beyond his delegated authority. See Buckman, 484 Mass. at 25 (regulation requiring submission of a medical parole plan and a written diagnosis to be submitted with petition for release on medical parole invalid as inconsistent with the legislative purpose of the statute to ensure an expeditious administrative process); see also Duarte v. Comm'r of Revenue, 451 Mass. 399, 411 (2008) (internal quotations, citations omitted) ("An agency has no authority to promulgate rules and regulations which are in conflict with the statutes or exceed the authority conferred by the statutes under which the agency operates.").[19]

The Secretary further cites City Council of Agawam v. Energy Facilities Siting Bd., 437 Mass. 821, 828 (2002) for the proposition that the Court is required to give "agencies broad discretion to interpret statutes that they enforce, lending 'substantial deference' to their interpretations[, which] ... include[s] approving agency regulations that, while technically

[19] The Secretary's argument that he followed Congress' guidance given in the National Securities Markets Improvement Act of 1996, which preserved state power "to investigate and bring enforcement actions ... with respect to fraud or deceit, or unlawful conduct by a broker dealer," when he exercised his discretion in implementing the Fiduciary Duty Rule, and that he therefore complied with Section 415's "direction" to "coordinate[]" with federal law (Defendant's Memo, Docket No. 33, at 9), ignores the facts. The purpose of Section 415 was to harmonize state and federal law. Adoption of the Fiduciary Duty Rule as a counterweight to Reg BI creates disharmony.

enlarging the meaning of a statute, are consistent with its intent." See also Tr. at 1-67. But that concept is inapplicable here because the Fiduciary Duty Rule is not a technical enlargement of the meaning of MUSA, but rather signals a departure from the direction contained in MUSA that Massachusetts law be coordinated with federal and state law elsewhere. See Buckman, 484 Mass. at 24 ("deference does not suggest abdication; '[a]n incorrect interpretation of a statute ... is not entitled to deference.'").

Nothing in Section 412, or in MUSA generally, suggests that the Legislature intended to give the Secretary authority to override existing Supreme Judicial Court precedent or to empower him, in the absence of clear direction, to re-define familiar securities concepts through rulemaking and thereby change, and make non-uniform, the law that applies to broker-dealers operating in Massachusetts. Accordingly, the Court shall declare Section 12.207 (1) (a) and the other sections implementing it void as contrary to MUSA. See Buckman, 484 Mass. at 27 ("[t]o the extent the secretary's regulations are contrary to the plain language and purpose of the statute, they [will be] ... declared void."

ORDER

For the foregoing reasons, the Secretary's motion is **DENIED** and Robinhood's motion is **ALLOWED**. The Court further **DECLARES** that 950 C.M.R. § 12.207 (1) (A), and those sections implementing it, Section 12.204 (1) (a) (4) and Section 12.204 (1) (a) (29), are unlawful.

In light of the significant public policy concerns at issue in this case, the Court **STAYS** this Order for thirty days to permit the Secretary time to pursue an appeal.

SO ORDERED.

M. D. Ricciuti
MICHAEL D. RICCIUTI
Justice of the Superior Court

Date: March 30, 2022